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No. 91-321

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In The

Supreme Court of the United States

October Term, 1991

ITEL CONTAINERS INTERNATIONAL CORPORATION,

Petitioner,

v.

JOE HUDDLESTON, COMMISSIONER OF REVENUE, STATE OF TENNESSEE,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Tennessee

BRIEF OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether a state sales tax levied on the privilege of engaging in business in the taxing state, which is measured by the gross proceeds derived by a lessor from lease contracts in which the leased property is located in and delivered to the lessee in the taxing state, is precluded by the Foreign Commerce Clause from being imposed on such leases of cargo containers which are ultimately used in international commerce.

2. Whether such a state tax is preempted by the Customs Conventions on Containers of 1956 and 1972.

3. Whether such a state tax is precluded by the Import-Export Clause.

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On Writ Of Certiorari To The Supreme Court Of Tennessee

BRIEF OF RESPONDENT

STATEMENT OF THE CASE

Tennessee's sales tax is a conventional, widely-accepted form of state taxation, closely similar to the sales tax systems relied upon by over 40 other states for crucial state and local revenues.[1] Such taxes are normally imposed upon the privilege of engaging in retail sales or similar activities in the taxing state, local activities which directly enjoy the benefits and protections of the state. In

[1] All states except Delaware, Montana, New Hampshire, and Oregon impose some type of sales and use tax, distinct from other common revenue measures such as property tax and income tax. See 1A ALL STATES SALES TAX REP., ¶8-410 (CCH).

this particular case, Tennessee's generally applicable sales tax was imposed on a business which (1) has facilities and property located in Tennessee and (2) consummated its retail leases by delivering leased property within the state to its customers. The taxpayer is not itself an importer or exporter of goods in commerce or a shipper of such goods. Nonetheless, it claims that it is immune from state tax on its leases, because the taxpayer's customers ultimately use the leased property to transport the customers' goods in international commerce. The Tennessee courts correctly found that application of the sales tax (1) is not barred by agreements, statutes, or constitutional provisions reflecting international commerce concerns, and (2) is a fair exaction upon a business with local operations, to contribute its just share to the support of state and local government.

A. The Tennessee Sales Tax.

The Tennessee Retailers' Sales Tax Act imposes a privilege tax upon business activity occurring in Tennessee. Tenn. Code Ann. § 67-6-201[2] provides:

> It is declared to be the legislative intent that every person is exercising a taxable privilege who engages in the business of selling tangible personal property at retail in this state . . . or who rents or furnishes any of the things or services taxable under this chapter. . . .

The sales tax treats lease transactions the same as outright sales, recognizing the practical business reality

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[2] Tennessee statutes cited here are set forth in the appendix to this brief.

that a lease is but a sale for a limited duration. Taxable "sale" is defined as:

> *any transfer of* title or *possession,* or both, exchange, barter, *lease or rental,* conditional or otherwise, in any manner or by any means whatsoever of tangible personal property *for a consideration*. . . .

Tenn. Code Ann. § 67-6-102(23)(A) (Supp. 1991) (emphasis added).

The sales tax on lease transactions is levied "on the gross proceeds of all leases and rentals of tangible personal property in this state." Tenn. Code Ann. § 67-6-204(a). The rate of sales tax on leases is exactly the same as the rate on outright retail sales. Tenn. Code Ann. § 67-6-202. Thus, regardless of whether a transaction is labeled a "sale" or a "lease," if the actual "transfer of title or possession or both" of tangible personal property "for a consideration" occurs in Tennessee, such activity by the seller/lessor is taxable.

The incidence of the sales tax is not upon the property which is the subject of a transaction, or upon the transferee, but only upon the seller or lessor doing business in Tennessee. *Beare Co. v. Olsen,* 711 S.W.2d 603, 605 (Tenn. 1986). Although Tennessee statutes provide for the seller/lessor to pass the tax on to its customers, if possible, the legal burden of and ultimate liability to the state for the tax are only upon the seller/lessor. *Id.; Smoky Mountain Canteen Co. v. Kizer,* 193 Tenn. 598, 603, 247 S.W.2d 69, 72 (1952).

So long as the transfer of personal property occurs in Tennessee, from a transferor located in the state to a transferee present there, the seller/lessor is subject to tax, even if the transferee intends to and does export the

merchandise thereafter. *Jack Daniel Distillery v. Jackson*, 740 S.W.2d 413, 416 (Tenn. 1987). Such a transaction is taxable because the tax is upon the seller/lessor's ability to make a sale or lease precisely because it has facilities, employees, or product advantageously located in Tennessee, enjoying the benefits and protections of Tennessee government and society. Thus, for example, if a visitor to Tennessee buys a piece of furniture or rents a videotape and takes delivery in Tennessee, even though the items are used by the visitor entirely at his home in another state or even another country, sales tax would unquestionably be due from the seller or lessor.

On the other hand, Tennessee's sales tax laws expressly provide that

> It is not the intention of this chapter to levy a tax upon articles of tangible personal property imported into this state or produced or manufactured in this state for export.

Tenn. Code Ann. § 67-6-313(a).

This "import-for-export" exemption clearly establishes that if personal property is brought into Tennessee and then later sent out-of-state, without an intervening sale or lease transaction occurring, then the sales tax is not imposed. *Beecham Laboratories v. Woods*, 569 S.W.2d 456, 458 (Tenn. 1978). Only when some intervening transfer of title or possession for consideration occurs in Tennessee – that is, when a specific and substantial business activity occurs in Tennessee – does the tax become due. *Jack Daniel*, 740 S.W.2d at 416. Thus, the sales tax is based only upon discrete, but substantial, business activities occurring within Tennessee.

B. The Taxpayer.

Itel Containers International Corporation is a Delaware corporation, based in San Francisco, California. (Pet. App. at 27a; Stip. ¶4). Itel is not itself engaged in the import-export business or in international shipping, but is primarily engaged in the business of furnishing, as lessor, cargo containers to its customers for their use in transporting goods in international commerce. (Pet. App. at 28a; Stip. ¶5).

Itel's containers, while under lease, were used by Itel's customers exclusively in international commerce. However, Itel was not itself an importer, exporter, or shipper of any goods transported in such containers. Each container was brought into Tennessee at the conclusion of one lease and stored there until it was delivered to another customer at the beginning of another lease.

The Tennessee Department of Revenue assessed sales tax, penalty, and interest against Itel, attributable to Itel's transactions in Tennessee during the audit period of January 1, 1983, through November 30, 1986. (Pet. App. at 28a; Stip. ¶6). Sales tax was assessed upon Itel's transfers of possession to its leasing customers of cargo containers at the Tennessee locations where the containers were stored. (Pet. App. at 31a; Stip. ¶¶31 *et seq.*).

During the early part of the audit period, containers belonging to Itel were placed at "third-party" depots in such Tennessee locations as Memphis, Nashville, and Chattanooga. (Pet. App. at 31a; Stip. ¶32). Customers in need of cargo containers would arrange with Itel's offices outside Tennessee to lease the containers. Then, the customer or an agent of the customer would pick up and take delivery of the containers at the Tennessee location. (Pet. App. at 27a; Stip. ¶3).

Beginning August 1, 1985, Itel maintained a terminal of its own in Memphis, Tennessee. (Pet. App. at 31a; Stip. ¶33). The terminal, staffed by Itel employees, was used by Itel for receiving incoming containers being returned at the conclusion of their leases, storing containers, and making repairs. The terminal was also used as the site at which containers going out on lease were delivered to and picked up by Itel's customers. (Pet. App. at 31a; Stip. ¶¶32-37).

Throughout the audit period, Itel was registered with the Tennessee Department of Revenue as a dealer, and reported sales and use taxes on other transactions. (Pet. App. at 31a; Stip. ¶38).

C. The Decisions Below.

The courts below carefully applied the precedents of this Court in upholding the sales tax against Itel's constitutional challenges.

The case was tried before the Chancery Court for Davidson County, Tennessee. The Chancellor found that Itel located its facilities in Tennessee "for the business advantage of regional deliveries" and that advantage "is realized when [Itel] earns the right to payment by delivering over its containers to leasing customers in this state." (Pet. App. at 21a-22a). The court recognized that the sales tax "goes no further than this [in-state] portion of Itel's business." Further, the tax is nondiscriminatory because it is imposed "whenever any goods change hands for consideration in Tennessee." (Pet. App. at 22a). Therefore, the Chancellor found that the tax satisfied the elements of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), and that Itel was "simply being asked to pay

for what it is getting" in terms of state benefits and protections. (Pet. App. at 22a).

The Chancellor also considered and applied the analysis of *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979), but found the facts of that case distinguishable, and found "no intrusions on international commerce" here. (Pet. App. at 21a-22a). Distinguishing the property tax in *Japan Line* from the sales tax in this case, the trial court recognized that "it is the value of doing business in this state that is being taxed, not the value of the cargo containers." (Pet. App. at 22a). Also, because the Tennessee tax is upon the initial transfer of possession of leased property, it falls upon "a one-time event in a lease that can only occur in one taxing jurisdiction." Therefore, "none of the risks of multiple taxation identified in *Japan Line*" are present here, and there is "no impairment of uniform [federal] trade regulation." (Pet. App. at 22a). Thus, the trial court rejected Itel's foreign commerce contentions, and upheld the assessment of $158,012.00 in sales tax, penalty, and interest.[3]

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[3] On another part of the assessment, however, the trial court ruled in favor of Itel. At trial, there was dispute as to whether tax was properly collected on so-called "shipper pool arrangements," in which shippers of goods intending to use overseas carriers would pick up empty cargo containers free of charge from Itel at Tennessee locations, and transport them to ports of exit outside Tennessee. Under shipper pool arrangements, the container leases would not commence, and thus Itel earned no right to receive rents, until the containers arrived at the ports outside of Tennessee. The trial court disallowed that portion of the assessment, holding that where delivery was consummated outside the state the transactions were not properly taxable by Tennessee. (Pet. App. at 20a-21a). That portion

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The Tennessee Supreme Court affirmed, after thorough analysis and application of this Court's pertinent decisions. The court began by recognizing that the Commerce Clause does not relieve those engaged in interstate or international commerce from their just share of local tax burdens "even though it increases the cost of doing business." *Itel Containers International Corp. v. Cardwell*, 814 S.W.2d 29, 34 (Tenn. 1991), *quoting Complete Auto*, 430 U.S. at 288. The court found the four Complete Auto factors to be satisfied, and proceeded to apply the *Japan Line* analysis. *Id.*, 814 S.W.2d at 36.

The Tennessee court held that the sales tax is imposed not on the value of Itel's containers, but on the transfer of possession of the containers in Tennessee, a "discrete transaction occurring only within Tennessee." *Id.*, 814 S.W.2d at 33, 36. Thus, the court found the sales tax distinguishable from the property tax in *Japan Line*, and more analogous to the sales tax on aviation fuel upheld in *Wardair Canada, Inc. v. Florida Dept. of Revenue*, 477 U.S. 1 (1986), and the business tax on stevedoring activities sustained in *Department of Revenue v. Association of Washington Stevedoring Cos.*, 435 U.S. 734 (1978). Further, because the tax falls only upon discrete transactions occurring only in one taxing jurisdiction, the court found no risk of true multiple international taxation. "The fact that other jurisdictions might tax other transactions involving these containers is irrelevant" and "clearly is not what is meant by 'multiple international taxation' in

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of the Chancery Court's holding was not appealed by the Department. Thus, the taxability of shipper pool leases is no longer at issue.

Wardair or *Japan Line*." *Itel*, 814 S.W.2d at 36n.8. For similar reasons, the court found that the sales tax here does not impair uniformity of federal policy in regulating foreign trade. *Id.*, 814 S.W.2d at 37.

Addressing the federal customs laws and the Customs Conventions on Containers, the court found that while Congress certainly has the power to prohibit state sales taxes on cargo container leases, it has not done so. The court found that, in fact, no evidence exists of congressional intent to confer advantages upon container companies other than exemption from customs duties and similar import or export taxes. *Id.*, 814 S.W.2d at 34. Because Tennessee's tax is not a customs duty, and is not at all a direct tax on goods in commerce, it does not violate the policies embodied in the Customs Conventions or the customs laws. *Id.*, 814 S.W.2d at 36-38.

Finally, the Tennessee court found that because the sales tax is upon business activity, and "not the value of the goods themselves," it is an indirect tax which does not violate the policy concerns of the Import-Export Clause. *Id.*, 814 S.W.2d at 37-38.

SUMMARY OF ARGUMENT

I.

A. The United States Constitution and decisions of this Court recognize the sovereign power of states to tax local business activities. Tennessee's sales tax is a generally applicable tax on local business activities, levied on a party doing business in this state. The tax on Itel's leases of cargo containers is not a direct tax on the containers themselves nor is it a property tax at all. Therefore, the

sales tax is completely distinguishable from the *ad valorem* property tax invalidated in *Japan Line,* 441 U.S. 434. The sales tax is imposed only when a transfer of title or possession of personal property for consideration occurs in Tennessee. Therefore, the tax is not imposed by reason of importation, or on mere transit through the state.

B. The Foreign Commerce Clause is not violated, because its policy concerns are not impaired by the Tennessee tax. Because the tax is on discrete transactions occurring only in Tennessee, it creates no risk of impermissible multiple international taxation. The fact that other nations may try to tax Itel's containers, or tax some other transaction involving the containers, is irrelevant and does not constitute the sort of multiple taxation with which the Foreign Commerce Clause is concerned. Itel's overly broad view would totally sacrifice the taxing power of the states to the vagaries of other nations' tax laws. Tennessee's tax is internally and externally consistent, and is a practical, reasonable, and widely-accepted means of taxing local business activities.

C. The tax does not impair the federal government's ability to speak with one voice in conducting foreign affairs. No clear federal directive is violated. The Customs Conventions on Containers do not apply, because the tax here is not levied on importation. Federal statutes and rules relieve Itel's cargo containers only from customs duties. The sales tax is simply not a customs duty. The state tax is not preempted by the general customs laws because there has been no clear expression of congressional intent to limit state taxing powers with regard to cargo containers. Further, this is not an area requiring uniform federal policy, because the sales tax here does not discriminate against or even act directly upon foreign

interests. Therefore, there is no realistic prospect of foreign retaliation such as would require a uniform national response.

II.

The sales tax here does not offend the Import-Export Clause. The sales tax simply is not a tax on imports or exports. Itel's containers are not themselves imports or exports. They are equipment used in foreign trade. The sales tax is generally applicable to Tennessee business activity, and therefore is not a tariff. Thus, the tax does not impair the federal government's "one voice" in foreign relations. The tax readily satisfies the four elements of the *Complete Auto* Commerce Clause analysis. Therefore, the tax does not implicate the policy concerns of the Import-Export Clause as analyzed in *Michelin Tire Corp. v. Wages,* 423 U.S. 276 (1976).

ARGUMENT

This case involves a sales tax, the most basic form of state and local taxation, imposed on businesses located in taxing states and limited to transactions taking place in those states. Indeed, it is the exercise of one of the most traditional and essential functions of state and local government in this country.

This case does not represent, as petitioner contends, "a collision between the power of the Federal Government and of a State to regulate foreign commerce." (Pet. Br. at 2). The United States as amicus curiae has found no collision. Respondent has found no collision. The reason

the supposedly colliding powers find no collision is simple: this case is not about the regulation of foreign commerce. This case does not involve foreign-owned property or a transaction taking place in a foreign country. It does not involve an importer, exporter, shipper, or foreign government. The tax involved does not apply to imported or exported goods or even to goods at all. The sales tax in this case is simply applied to container leases where possession is transferred in the taxing state.

The Tennessee sales tax is a generally applicable revenue system. The tax supports state and local government services by taxing, according to volume of business, those local business activities which benefit from such services. The fairness of the tax is shown by the breadth of its sweep; it is imposed "whenever any goods change hands for consideration in Tennessee." (Pet. App. at 22a). The tax is not targeted toward international commerce, and is by no means an attempt to regulate foreign trade. The focus is strictly upon business activity occurring in Tennessee's marketplace.

In this case, the sales tax fell upon a company doing substantial business in Tennessee. Itel is not itself in the business of importing or exporting goods in international commerce, and the tax here is not upon such goods. Itel does lease equipment to companies wishing to transport their goods in international shipping, but the tax is neither upon that equipment nor those customers. Instead, the tax is on Itel's activity in transferring that equipment to its customers for profit in Tennessee, measured by the consideration received by Itel in those transactions.

Thus, the tax in this case is not a tax on international commerce at all. It is simply an exercise of the state's sovereign taxing power. With due respect for the interests of the federal government, the goals of international relations, and most importantly, the requirements of the United States Constitution, taxation of such transactions is not prohibited.

I. TENNESSEE'S SALES TAX IN THIS CASE DOES NOT OFFEND THE FOREIGN COMMERCE CLAUSE.

Itel's primary challenge to the Tennessee sales tax in this case is based upon the foreign commerce element of the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3. The Tennessee courts rejected those arguments, finding "no intrusions on international commerce." (Pet. App. at 21a).

When a state tax is alleged to interfere with the federal government's power under the Commerce Clause to regulate foreign commerce, two inquiries[4] are in order: (a) whether the tax creates a substantial risk of multiple taxation; and (b) whether the state tax prevents the federal government "from speaking with one voice when regulating commercial relations with foreign governments." *Wardair Canada, Inc. v. Florida Dept. of Revenue*, 471 U.S. 1, 8 (1986). So long as the state tax neither raises

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[4] The two foreign commerce inquiries are, of course, in addition to the familiar four-pronged analysis for interstate commerce under *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), which is readily satisfied here. See discussion *infra* at 43-48.

a substantial risk of multiple taxation nor impairs uniformity of federal policy regarding foreign commerce, the tax is constitutionally permissible. *Id.*

Itel bases its Foreign Commerce Clause argument almost entirely on the opinion in *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979). The facts in *Japan Line*, however, are significantly different from those present in this case. In *Japan Line*, local governments imposed property tax on property owned by foreign nationals. The tax challenged in that case was an *ad valorem* property tax, not a privilege tax on discrete local activities such as Tennessee's sales tax. Further, the property taxed by California's local governments in *Japan Line* was also, in fact, taxed by Japan itself. *Id.*, 441 U.S. at 436.

In *Japan Line*, this Court expressly declined to rule on whether American states could constitutionally tax domestically owned instrumentalities used in foreign commerce. *Id.*, 441 U.S. at 444n.7. Instead, this Court carefully stated the issue in *Japan Line*, and thus the holding on that issue, extremely narrowly:

> The question here is a much more narrow one, that is, whether instrumentalities of commerce that are owned, based, and registered abroad and that are used exclusively in international commerce, may be subjected to apportioned ad valorem property taxation by a State.

Id., 441 U.S. at 444.

Thus, as the Tennessee Supreme Court found, it is abundantly clear that the *Japan Line* decision, while analytically instructive, is not dispositive of this case. *Itel*, 814 S.W.2d at 35.

A. Tennessee's Sales Tax Is Distinguishable From The Property Tax in *Japan Line*.

As the Tennessee Supreme Court has long recognized, as a matter of state constitutional law, the sales tax is not an *ad valorem* property tax, but instead a privilege tax on persons engaging in certain types of business activities in Tennessee. *Hooten v. Carson*, 186 Tenn. 282, 285, 209 S.W.2d 273, 274 (1948). Under the Tennessee Constitution, legislative authority is quite different in these two areas of taxation. The categorization of a particular tax is of state constitutional dimensions. TENN. CONST. art. II, § 28.

Property taxes are direct taxes on the value of the property, and therefore require some appraisal and assessment of the actual value, considering factors such as book cost, replacement cost, inflation, depreciation, and abstract fair market income potential. The Tennessee sales tax, on the other hand, is measured not by the value of the property, but by the total consideration, or the "gross proceeds," received under a contract of sale or lease.

Itel erroneously asserts that the rentals received under a lease are simply that portion of the value of the leased property corresponding to the time limits of the lease. Realistically, however, the consideration in a lease contract is simply a figure agreed upon by the parties to reflect numerous factors. The parties often may weigh the market position, strength, and volume of business enjoyed by the lessor more heavily than the actual value of the property. Often the consideration in a lease contract bears scant relationship to the actual value of the leased property.

As to leasing activity, Tennessee's sales tax is measured by the "gross proceeds" of the lease, which includes everything of value received by the lessor under the lease, and is not determined necessarily by the value of the leased property. *Furniture Lease Co. v. Tidwell,* 495 S.W.2d 535, 536 (Tenn. 1973). The taxable gross proceeds of a lease can include charges, often hidden or "built-in," for services rendered by the lessor in conjunction with the bare transfer of property. *Saverio v. Carson,* 186 Tenn. 166, 168, 208 S.W.2d 1018 (1948). By including charges for additional services, the taxable gross proceeds of leasing activity can in some instances actually exceed the value of the leased property. On the other hand, a lease of valuable personal property for a nominal rental would be taxable only to the extent of the nominal consideration, far short of the actual value of the property. The critical point is that the tax is upon the lessor's business activity, not the value of the leased property.

Further, an *ad valorem* property tax (like a customs duty) is an *in rem* tax for which the property itself is liable. Unpaid property taxes become a lien upon the property itself, for which the taxed property may be seized and sold by the proper authorities. *See, e.g.,* Tenn. Code Ann. § 67-5-2101. Sales taxes, in contrast, are taxes levied personally against the person or firm engaging in business. Delinquent sales taxes are not collected from or out of the personal property sold or leased; such property is by then already in the hands of the taxpayer's customer/transferee. Instead, unpaid sales taxes are collected by revenue authorities from the seller/lessor, out of whatever assets it may possess. *See, e.g.,* Tenn. Code Ann. § 67-6-517. The incidence of the sales tax, despite any pass-through provisions, is upon the seller/lessor.

Beare Co., 711 S.W.2d at 605; *Smoky Mountain Canteen,* 247 S.W.2d at 72.

Also, property taxes normally are recurrent and are assessed against the same property, as its value may increase or decrease, annually. In contrast, sales taxes are measured by discrete, one-time transfers of ownership or possession of goods. *See United States v. Sullivan,* 270 F.Supp. 236, 244 (D. Conn. 1967), *rev'd on other grounds,* 395 U.S. 169 (1969). When a retailer sells a piece of furniture or rents a videotape to a consumer, that transaction is subject to tax, but the same transaction is not subjected to the same tax again at a later date.

The distinctions between *ad valorem* property taxes and sales or privilege taxes are also important as a matter of state constitutional law. Article II, § 28, of the Tennessee Constitution describes in detail the means by which property may be taxed, and requires that the ratio of assessment to value of property "in each class or subclass shall be equal and uniform throughout the State." In contrast, that same section of the Tennessee Constitution empowers the legislature "to tax merchants, peddlers, and privileges, in such manner as they may from time to time direct." In applying those different provisions of article II, § 28, the Tennessee Supreme Court has long recognized the real differences between property taxes and privilege taxes. *See Hooten,* 209 S.W.2d at 274.

Therefore, Tennessee's sales tax is not a direct tax on property, and is not measured by the value of property. Instead, Tennessee's tax, measured by the gross proceeds of leases, is more akin to a tax on income derived from

leases. Such a tax is patently distinguishable from the flat, direct property tax in *Japan Line*.[5]

B. Tennessee's Sales Tax Does Not Create A Substantial Threat Of Impermissible Multiple International Taxation.

Itel relies heavily upon the *Japan Line* opinion to argue that in essence any state tax touching its international cargo containers, or any activity involving those containers, would unavoidably result in multiple international taxation impermissible under the Foreign Commerce Clause. However, Itel's broad-sweeping view of the concept of multiple international taxation would prohibit any state taxation of activity relating to international commerce, even though such activity is essentially local in nature. Such a view is contrary to the law.

In *Japan Line*, local governments in California assessed *ad valorem* property tax on cargo containers owned by a Japanese company. 441 U.S. at 436-37. The containers were also subject to property tax in Japan and were in fact taxed there. *Id.* Thus, the same type of tax on

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[5] In *Japan Line*, this Court took note of the Convention Between the United States of America and Japan for the Avoidance of Double Taxation, Mar. 8, 1971 [1972], 23 U.S.T. 967, 1084-85, T.I.A.S. No. 7365, which provided that income "derived by a resident of a Contracting State . . . from the use, maintenance, and lease of containers and related equipment . . . in connection with the operation in international traffic of ships or aircraft . . . is exempt from tax in the other Contracting State." *Japan Line*, 441 U.S. at 446n.10. Thus, as that international agreement, and this Court, recognized, a tax on proceeds derived from the lease of containers is plainly different from a direct property tax on the containers themselves.

the same property was imposed by multiple taxing jurisdictions. Because Japan certainly possessed the primary right and power to impose property tax on the full value of the containers owned and based in Japan, this Court found that California's local property tax produced multiple taxation in fact. *Id.*, 441 U.S. at 452.

In a later case, however, this Court recognized that no threat of multiple international taxation is created by a state tax imposed only on "a discrete transaction which occurs within one national jurisdiction only." *Wardair Canada*, 477 U.S. at 9. In *Wardair Canada*, this Court upheld a Florida tax on sales in Florida of aviation fuel used in foreign air commerce. *Id.*, 477 U.S. at 3-4. Because the tax was imposed only upon the sales of fuel, and only upon those sales occurring in Florida, the Court recognized that multiple international taxation was not possible. *Id.*, 477 U.S. at 9.

The distinction between *Japan Line*, where two jurisdictions taxed the same value of the same property, and *Wardair Canada*, involving a tax on a discrete transaction occurring only in the taxing jurisdiction, illustrates the meaning of the phrase "multiple taxation" as used in constitutional analysis. Multiple taxation means repeated taxation of the precise same act or event. Because the taxable event in *Wardair Canada* was the sale of fuel, and a particular sale could occur only at one time and in one place, that event was simply not subject to repeated taxation. The fact that some other jurisdiction might try to tax a different event, even though related to the same taxpayer or the same property, would not amount to constitutionally impermissible multiple taxation.

Furthermore, this Court has explicitly instructed that statements in the *Japan Line* opinion regarding overlapping taxes are not to be construed as an absolute prohibition on state-induced double taxation in the international context. *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159, 189 (1983). Thus, as demonstrated by *Wardair Canada*, state taxes on discrete taxable events occurring locally, even if related to international commerce, are not absolutely prohibited by the foreign commerce aspect of the Commerce Clause.

Fundamentally, the question of multiple taxation requires a practical inquiry. Itel apparently sees a threat of multiple international taxation in the possibility that another nation may tax some other aspect of the lease transactions taxed by Tennessee; for example, the use of the leased containers overseas. In the years since *Japan Line*, however, this Court has refined the analysis of such contentions in the interstate context. The likelihood of a state tax inducing impermissible double taxation is determined by examining whether the tax is internally and externally consistent. *Goldberg v. Sweet*, 488 U.S. 252, 109 S.Ct. 582, 588 (1989).

As the *Goldberg* Court explained, the internal consistency test requires that a tax be structured such that, if every other jurisdiction were to impose an identical tax, no multiple taxation would occur. *Goldberg*, 109 S.Ct. at 589; *citing Container Corp.*, 463 U.S. at 169. Thus, the test hypothesizes that other jurisdictions have enacted taxes identical to the one under scrutiny. *Id.*

For example, the interstate telecommunications excise tax in *Goldberg* was found to be internally consistent, because if every jurisdiction taxed only those telephone calls charged to an in-state address, only one state

would tax each call. Similarly, as to Tennessee's sales tax, if every state only taxed the transfer of possession of leased property for consideration within its borders, like Tennessee, only one jurisdiction would be able to tax each lease transaction. Tennessee's sales tax plainly is internally consistent.

In contrast, if every jurisdiction were to impose an identical *ad valorem* tax on personal property, then a given item could very well be subjected to taxation by multiple jurisdictions. Such a tax system would not be internally consistent.

The property tax in *Japan Line*, because it was peculiarly apportioned, might have satisfied the internal consistency standard for interstate commerce purposes. *Japan Line*, 441 U.S. at 445n.8. However, because apportionment cannot be ensured on a global basis, fair apportionment was insufficient to rescue that tax. *Id.*, 441 U.S. at 447. In a real sense, however, the *Japan Line* decision is compatible with the internal consistency analysis, as it might be adapted to the international context. Disregarding the apportionment features of the California tax, because other nations, such as Japan, would not be expected to apportion their property taxes, one would be forced to analyze the property tax as if it were imposed on the full value of the subject property. Viewed in such a way – hypothesizing that all other nations imposed the identical tax – the California property tax in *Japan Line* would have failed this international adaptation of the internal consistency test; if all nations imposed a full property tax on property located within their borders, a container located in a number of different countries over the course of a given tax year could likely be subjected to multiple property tax assessments. Use of the internal

consistency test to evaluate international multiple taxation problems thus addresses the *Japan Line* concerns regarding potential international friction. At the same time, it does not sacrifice the practicality and realism with which *Container Corp.* and *Goldberg* viewed business practices and state taxes.

Itel might argue, as did the unsuccessful appellant in *Goldberg*, that the inquiry should not focus on hypothetical identical taxes, but on similar, though not identical, taxes that other nations unaccustomed to American notions of conventional taxation might choose to impose. However, as the *Goldberg* Court, pointed out,

> If we were to determine the internal consistency of one State's tax by comparing it with slightly different taxes imposed by other States, the validity of state taxes would turn solely on "the shifting complexities of the tax codes of 49 other States."

Goldberg, 109 S.Ct. at 589, *quoting Armco, Inc. v. Hardesty*, 467 U.S. 638, 645 (1984).

The same logic should apply with equal force in considering international multiple taxation. If an American state's taxation efforts were to rise or fall solely upon comparison with the "shifting complexities" of the tax laws of all of the nations on earth, in practical effect the states would be absolutely prohibited from taxing any thing or activity in any way touching, however remotely, international commerce. The internal consistency test of *Container Corp.*, *Goldberg*, and their progeny suggests a rational response to the practical reality that reasonable taxation of local activities by states should not be held hostage by the vagaries of French, Japanese, or a hundred other nations' tax laws. In the international context as

well as between states, such a rule of reason is preferable to strict technicalities. *Container Corp.*, 463 U.S. at 190.

In any event, as the *Goldberg* Court noted, to the extent that other jurisdictions in fact impose taxes creating multiple taxation, such concerns are addressed by applying the external consistency test to the challenged state tax. That test turns on whether the state tax is measured by only that portion of the interstate (or international) activity which "reasonably reflects the in-state component of the activity being taxed." *Goldberg*, 109 S.Ct. at 589; *Container Corp.*, 463 U.S. at 169-70. The focus is on the practical or economic effect of the tax.

Again, in *Goldberg* the excise tax on interstate telephone calls was found to be externally consistent because its economic effect was like that of a sales tax, and the tax "reasonably reflect[ed] the way that consumers purchase interstate telephone calls." *Goldberg*, 109 S.Ct. at 589. Similarly, in this case, Tennessee's tax is reasonably measured by the in-state activity taxed: Itel's activity in locating its facilities, employees, and product in Tennessee for the profitable purpose of making convenient deliveries to customers.

Furthermore, the economic effect of Tennessee's tax more than resembles a sales tax; it is in fact a sales tax. Itel suggests that the tax is improperly apportioned and creates a risk of multiple taxation because the leased containers are used by the lessees outside of Tennessee, and such usage could itself be taxed. However, the same could be said of the situation in which a souvenir trinket imported from Taiwan is purchased in Nashville, Tennessee, by a German tourist who immediately flies home with his treasure, never to return. The tourist's home nation might impose a use tax on the souvenir. Still, the

gross sales price of the trinket would without doubt be subject to tax under the laws of Tennessee or virtually any other state with a sales tax. This Court has never gone to the extreme of invalidating such a tax. *See, e.g., McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33 (1940). Practical economic realities – the substantial activities of the seller in the taxing jurisdiction, culminating in a transfer by sale or lease – dictate that such a transaction should be subject to the state's taxing power.

The Tennessee Supreme Court correctly reasoned that the possibility of other nations imposing different taxes on different transactions involving Itel's containers should not be considered impermissible multiple international taxation. *Itel*, 814 S.W.2d at 36n.8. Tennessee's sales tax in this case is a realistic effort to tax business activity actually occurring within this state. The tax is consistent both internally and externally. The tax does not create any substantial threat of multiple international taxation of the sort which would offend the Foreign Commerce Clause.

C. The Sales Tax In This Case Does Not Impair Uniformity Of Federal Policy On Foreign Commerce.

As noted, a state tax affecting foreign commerce may be invalid if it prevents the federal government "from speaking with one voice when regulating commercial relations with foreign governments." *Wardair Canada*, 477 U.S. at 9. A state tax fails the "one voice" test if it either violates "a clear federal directive" or implicates foreign policy issues which by their nature require uniform treatment by the federal government. *Container Corp.*, 463 U.S. at 194.

1. Sales tax on the transfer of possession of Itel's containers in Tennessee does not violate any clear federal directive.

Itel cannot point to any express federal policy, or "clear federal directive," prohibiting the Tennessee sales tax challenged in this case. Despite Itel's insistence, federal statutes and regulations, and the Customs Conventions on Containers of 1956 and 1972, fall far short of embodying any such clear federal policy.

a. The Customs Conventions on Containers do not preclude state sales taxes.

The Customs Conventions so broadly relied upon by Itel do not address state taxes on purely local activities. Still, Itel asserts that the imposition of Tennessee's sales tax upon the lease transactions in this case "cannot be reconciled with the language of the [1956 and 1972] Conventions [on Containers]." (Pet. Brief at 12). The specific language of these Conventions upon which Itel relies are the definitions of "import duties and taxes":

> 1956 Convention:
>
> The term "import duties and import taxes" shall mean not only Customs duties but also all duties and taxes whatsoever *chargeable by reason of importation*.
>
> 1972 Convention:
>
> The term "import duties and taxes" shall mean Customs duties and all other duties, taxes, fees and other charges which are *collected on, or in connexion with, the importation of goods*, but not including fees and charges limited in amount to the approximate cost of services rendered.

Customs Convention on Containers, art. I(a), May 18, 1956 [1969] 20 U.S.T. 301; Customs Convention on Containers, art. I(a), December 2, 1972, [1985] 988 U.N.T.S. 43 (emphasis added).

Under both Conventions, containers are granted temporary admission into signatory nations "free of import duties and import taxes . . . . " *Id.* According to Itel, the Tennessee sales tax is "inconsistent with the plain terms of the Container Conventions." (Pet. Brief at 12). The essence of Itel's argument is that the Tennessee sales tax is "triggered in a direct sense by the entry of goods into the taxing jurisdiction." (Pet. Brief at 14).

The critical flaw in Itel's argument lies in that conclusion. The Tennessee sales tax plainly is not triggered by the importation of the containers into the borders of Tennessee. The sales tax is *not* a tax "changeable by reason of importation," or "collected on, or in connexion with, the importation of goods," as those terms are used in the Customs Conventions on Containers. The Tennessee tax simply is not levied on imports, but is a generally applicable tax. Moreover, it is not the entry into Tennessee that triggers the tax, but a transfer within Tennessee to another party for consideration.

Many imported items are never involved in taxable transactions in light of the "import-for-export" exemption expressly provided by Tenn. Code Ann. § 67-6-313(a). *Beecham Laboratories*, 569 S.W.2d at 458. The assertion that sales tax on Itel's leases of its containers is a tax on imports, because the containers would not be in Tennessee but for importation, is simply illogical. It implies that an obviously necessary condition, presence in the state, is also sufficient causation for the tax to be imposed. As

illustrated by the "import-for-export" exemption, importation does not determine taxability; assuming purely for argument's sake that Itel's containers are "imported" into Tennessee, many such containers are never involved in transactions taxable in Tennessee.[6] The Customs Conventions on Containers, so broadly relied upon by Itel, do not even address, much less forbid, Tennessee's sales tax.

This Court has indicated a willingness to look not only at the text of a treaty when interpreting it, but also at "the context in which the written words are used." *Air France v. Saks*, 470 U.S. 392, 397 (1985). *See also United States v. Alvarez-Machain*, No. 91-712, slip op. at 11 (U.S. June 15, 1992) (Court looked to language of a treaty "in the context of its history"). The context within which the Container Conventions of 1956 and 1972 were written reveals an intent to free such containers from the imposition of traditional customs duties and import taxes, *not* to immunize from taxation all transactions which in any way touch upon such containers. The origins of the Container Convention of 1956 are found in the rebuilding of Europe after World War II through the Economic Commission for Europe (ECE). In particular, the Inland Transport Committee (ITC) of the ECE adopted a number of resolutions in the early 1950's pertaining to customs duties and the transport of goods throughout Europe. *See, e.g.*, Resolution 117 on Temporary Importation of Pleasure Craft, U.N. Doc.

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[6] This reality was recognized by the trial court in this case when it disallowed tax on transactions in which Itel delivered containers from its Tennessee locations, but where the transfer of possession to the lessee for consideration occurred outside Tennessee. (Pet. App. at 20a-21a).

E/ECE/TRANS/453 (1954); International Customs Convention on Touring, U.N. Doc. E/ECE/TRANS/SC1/155 (1953).

In 1950, the ITC submitted a Draft Customs Convention on International Transport of Goods by Road to the ECE. *See* U.N. Doc. E/ECE/109 (1950). The purpose of this proposal was to permit the "international transport of goods by road under the terms of the Convention without breaking of bulk across one or more frontiers between a customs office of departure of one contracting state and a customs office of destination of another contracting state, or of the same state." *Id.* at Ch. 2, art. II. The definition of "import or export duties" under this Draft Convention is virtually identical to the definition of "import duties and import taxes" in the 1956 Convention.[7] The 1950 Draft Convention focused upon traditional national customs duties and taxes on importation. The Tennessee sales tax is not a tax upon importation but upon a separate and distinct leasing transaction occurring in Tennessee.

In 1954, the ITC adopted a resolution which was the forerunner of the 1956 Convention. *See* Temporary Duty-Free Admission of Containers, Resolution No. 173, U.N. Doc. E/ECE/TRANS/449 (1954). Once again, the ITC focused upon traditional national customs duties and

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[7] The definition contained in the 1950 Draft Convention states that "the terms import or export duties and import or export taxes shall mean not only Customs duties but also all duties and taxes whatever chargeable by reason of importation or exportation other than any fees which may be chargeable for sanitary inspection and charges in the nature of statistical fees." Draft Customs Convention on International Transport of Goods By Road, U.N. Doc. E/ECE/109 (1950).

import taxes as the subject of concern, stating that "pending the conclusion of a general agreement on containers, it would be highly desirable for governments to incorporate in their *national customs regulations as uniform measures as possible in respect of the temporary duty-free admission of containers . . . .* " (emphasis added). *Id.* The 1956 Convention was drafted in the context of removing traditional national customs duties and import taxes as barriers to the transport of sealed containers throughout Europe. There is no affirmative indication of any intention that a sales tax such as Tennessee's upon leasing transactions was even contemplated under the Convention.[8]

The reason for the adoption of the 1972 Convention was not to ensure that "the breadth of the [import tax] prohibition is magnified" from the 1956 Convention as asserted by the petitioner. (Pet. Brief at 13). Rather, the 1956 Convention had become technologically and economically obsolete as noted by the Secretariat of the United Nations:

> As a result of the considerable increase in numbers of containers used in international traffic following the "container revolution," and because of the production of large series of containers in accordance with the same design type and on account of the need for both simplifying customs formalities and facilitating container

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[8] *See Alvarez-Machain*, slip op. at 7, in which the Court, in upholding the abduction of a Mexican national as not in violation of an extradition treaty between the United States and Mexico, noted that the treaty "says nothing about the obligations of the United States and Mexico to refrain from forcible abductions of people from the territory of the other nation, or the consequences under the Treaty if the abduction occurs."

> transport, the provisions of the 1956 Convention became obsolescent, obsolete and inadequate.
>
> The ITC [Inland Transport Committee] of the ECE [Economic Commission for Europe] decided to study how the provisions of the Conventions could be brought into line with technology and economic development and facilitation requirements.

United Nations Conference on International Container Traffic, Customs Questions Note By Secretariat, U.N. Doc. E/CONF.59/2 at 1 (1972).[9]

Also, the Secretariat discussed the need for registration of containers in order to avoid either no or double taxation on importation of such containers. In arguing for a registration system for containers, the Secretariat stated the following:

> A container is not an ordinary piece of merchandise, but a piece of transport equipment. So far it has been used mainly for international transport, but its use for domestic carriage in individual countries is increasing fast. The present situation has led to the formation of a stock of stateless containers, which have not complied with the fiscal requirements of any country and can therefore compete abnormally with the equipment used in domestic traffic. The present state of confusion, as it must be called, will not lead to a liberal development of international

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[9] The Secretariat's note also refers to "import duties and taxes on importation" which lends additional support to the view that the prohibition is against a tax directed *solely* at importation of containers. *Id.* at 46. Of course, Tennessee sales tax applies to the leasing transaction, irrespective of importation.

> container traffic, but may well cause some countries to adopt protective measures.

Id. at 59/16/Addendum 2 at 3.

The purposes of the Container Conventions of 1956 and 1972 are to remove the traditional customs duties and import taxes which would otherwise be imposed upon containers used in international commerce. The Secretariat in seeking a registration system for such containers raised concern about such containers operating tax free in unfair competition with domestic containers. Itel seeks to expand this benefit one huge step further by eliminating taxes not only upon the containers themselves but upon transactions occurring in certain jurisdictions which pertain to the containers, i.e., the Tennessee sales tax upon the leasing transactions occurring in Tennessee. Such an expansive view of the Conventions was not intended under either the 1956 or 1972 Convention.

By reading the Customs Conventions as prohibiting all taxes whatsoever relating to containers, Itel reduces the phrases "chargeable by reason of importation" and "collected on, or in connexion with, the importation of goods" to meaningless surplusage. However, this Court has indicated that all words in a treaty should be given meaning if possible. *Factor v. Laubenheimer,* 290 U.S. 276 (1933). International conventions and treaties simply cannot be construed to ignore language as Itel would wish.

The sales tax in this case was imposed only upon the privilege of engaging in business in Tennessee as reflected by the transfers of possession in Tennessee of tangible personal property for consideration. Tenn. Code Ann. §§ 67-6-201, -204, and -102(23)(A). The tax is not a prohibition or restriction on imports, and indeed there is no relation whatsoever to importation. Instead, the tax

here was measured by the transfers of containers which were already present in this state. Further, the tax was assessed against Itel, which is not even a party to importation of goods, but merely leases equipment to other companies which are engaged in the import-export trade. The Tennessee sales tax is not, by any contortion of logic, "chargeable by reason of importation," but is merely a privilege tax on activities occurring only in Tennessee.

b. No federal statute prohibits Tennessee's tax.

The federal statute cited by Itel, 19 U.S.C. § 1322(a), provides only that items such as Itel's containers shall be exempt from federal customs laws:

> Vehicles and other instruments of international traffic, of any class specified by the Secretary of the Treasury, *shall be granted the customary exceptions from the application of the customs laws* to such extent and subject to such terms and conditions as may be prescribed in regulations or instructions of the Secretary of the Treasury.

19 U.S.C. § 1322(a) (emphasis added).[10] The regulations issued under that statute go no further than to provide the exception from federal customs duties as directed by Congress. *See* 19 C.F.R. § 10.41a. Tennessee's sales tax is definitely not a federal customs duty, and is not even described, much less prohibited, by 19 U.S.C. § 1322 or the corresponding regulations. Yet, had Congress intended 19 U.S.C. § 1322 to exempt instruments of international traffic from state taxes, it could easily have done so.

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[10] That statute was amended in 1984 to substitute the words "shall be excepted" for "shall be granted the customary exceptions." 19 U.S.C. § 1322(a) (Supp. 1990).

While the federal statute and regulations and the Custom Conventions facilitate the use of containers in international commerce by removing duties, taxes, prohibitions, and restrictions normally applicable to imports, nowhere do federal laws or treaties expressly or otherwise bar state taxes not imposed on importation.[11] The Tennessee sales tax in this case does not violate any clear federal directive, law, or policy.

c. Tennessee's tax is not preempted by the federal customs laws.

Notwithstanding the total absence of any clear federal directive barring state taxation of Itel's containers, Itel argues that the federal statute (19 U.S.C. § 1322(a)) and regulation (19 C.F.R. § 10.41a) and the Customs Conventions on Containers amount to a "pervasive" scheme of regulation. Itel contends that such federal regulation preempts, under both the Commerce Clause and the Supremacy Clause (U.S. CONST. art. VI, § 2), any and all state action regarding international cargo containers.

Itel's preemption argument leans almost exclusively upon cases involving state taxation of goods located in government-supervised, customs-bonded warehouses. *Xerox Corp. v. County of Harris, Texas,* 459 U.S. 145 (1982); *McGoldrick v. Gulf Oil Corp.*, 309 U.S. 414 (1940). In those cases, this Court held essentially that state taxes on goods stored under Customs Service supervision in bonded warehouses are preempted by the comprehensive federal

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[11] Itel itself has recognized that preemption in this situation is disfavored ("preemption is disfavored in cases involving federal statutes because Congress is presumed not to have sought to displace state law.") (Pet. Br. at 14n.12).

regulations of customs duties. *Xerox*, 459 U.S. at 154. (*But see R.J. Reynolds Tobacco Co. v. Durham County, N.C.*, 479 U.S. 130, 152 (1986), which limited the holding in *Xerox* by upholding a state property tax on goods in a customs-bonded warehouse when the goods are destined for domestic sale). However, the federal customs warehouse statutes found in *Xerox* and *McGoldrick* to be so "comprehensive" and preemptive are significantly different from the statute addressing cargo containers, and are based upon completely different federal policies. Therefore, the *Xerox* and *McGoldrick* decisions do not control this case.

The *Xerox and McGoldrick* cases involved the specific statutes pertaining to customs-bonded warehouses, which in their most recent incarnation are found at 19 U.S.C. §§ 1555 and 1557. Those statutes provide that imported goods may be stored, duty free, for specified periods of time, in government- supervised bonded warehouses. *Xerox*, 459 U.S. at 150; 19 U.S.C. § 1555(a). While in those bonded warehouses, the goods are in the joint custody of the United States Customs Service and the warehouse proprietor, and under the continuous control and supervision of the customs officers. *Id.* The United States Customs Service "is in charge" of the warehouse and all work performed there is under its "supervision." *Xerox*, 459 U.S. at 148n.2; 19 U.S.C. § 1555. Detailed federal regulations control every aspect of the operation of such warehouses. *Xerox*, 459 U.S. at 150.

In contrast, the statute cited by Itel as "pervasively" regulating cargo containers, 19 U.S.C. § 1322(a), merely provides that "instruments of international traffic . . . shall be excepted from the application of the customs laws." While customs warehouses are regulated in every detail by federal law and in fact are directly

supervised by the Customs Service, pursuant to 19 U.S.C. § 1555, cargo containers, under 19 U.S.C. § 1322, are merely "excepted" from customs laws. The bonding requirements for containers, so stressed by Itel, merely help identify the instrumentalities intended to be exempt from customs. Containers are not under the supervision and certainly not in the custody of customs officers. Containers are not located in the discrete "enclaves" created by customs warehouses, but may be found wherever companies such as Itel and its customers choose to place them. The bonding requirements for customs warehouses, on the other hand, trigger direct, detailed supervision and custody by federal customs officers. Clearly, the federal statute and regulations regarding cargo containers do not begin to approach the comprehensive nature of the laws governing customs warehouses as analyzed in *Xerox* and *McGoldrick*.

Further, in determining whether federal law preempts state action, the courts must "give primary emphasis to the ascertainment of congressional intent." *R.J. Reynolds*, 479 U.S. at 152. In view of the "sensitive interrelationship" of federal and state sovereignty, this Court has recognized that

> we must be mindful of the principle that "federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons – either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained."

Id., (citations omitted).

In *Xerox*, legislative history explicitly showed that the customs warehouse laws were intended by Congress "to stimulate business for American industry and work for

Americans." *Xerox*, 459 U.S. at 151. By waiving customs duties on goods intended for reexportation from the warehouses, the warehouse laws were explicitly intended to make American ports more attractive and convenient places for transshipment of goods in foreign commerce. *Id.* By creating a system of duty free customs warehouses, Congress sought "to encourage merchants here and abroad to make use of American ports." *Id.* Thus, the Court has recognized that the express congressional policy underlying the customs warehouse laws was to protect and promote domestic business, and indeed to create an affirmative competitive advantage for American industry and labor over their foreign counterparts. State taxation which would operate to "lessen the competitive advantage conferred on the importer by Congress" would thus violate the purposes of the warehouse laws. *Id., citing McGoldrick*, 309 U.S. at 429. In such a case, a finding that federal law preempted state action would be appropriate.

While the customs warehouse laws were intended to create a positive competitive advantage for American business, and thus a relative disadvantage to foreign competitors, there is no evidence of any similar congressional intent regarding cargo containers. As argued above, the Customs Conventions on Containers prohibit only duties, taxes, and restrictions by reason of importation, and presumably leave all of the signatory countries free to impose other taxes, including local taxes, not tied to importation. Federal law, 19 U.S.C. § 1322(a), and the related regulations, similarly relieve international cargo containers only "from the application of the customs laws."

In the absence of some clear federal policy, unmistakably ordained by Congress, which would be violated by the sales tax in this case, Tennessee's sales tax should not be considered preempted by federal law.

2. The tax in this case does not intrude upon any area requiring uniformity of federal policy regarding foreign trade or relations.

The question whether a state tax intrudes upon areas requiring uniform federal foreign policy usually arises where the state action would provoke retaliation by foreign governments against the United States as a whole. *Container Corp.*, 463 U.S. at 194. In that context, the courts are faced with the difficult task of balancing the particular risks of foreign retaliation against "the sovereign right of the United States as a whole to let the States tax as they please." *Id.*

In this case, the sovereign right of the United States to allow its constituent states to impose taxes, and the sovereign power of the State of Tennessee to impose taxes based upon local activities, are not outweighed by any risk of foreign retaliation, because there is no reasonable and substantial risk of such retaliation.[12] Itel's efforts to imagine scenarios of foreign retaliation are based upon a

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[12] *See Container Corp.*, 463 U.S. at 203n.4 (Powell, J., dissenting) in which similar protests from our principal trading partners failed to sway this Court into invalidating a reasonable state tax.

misunderstanding of the legal effect of Tennessee's tax, and a faulty analysis of the economic effect of the tax.

As discussed above, the legal incidence of Tennessee sales tax is upon the vendor or seller/lessor, not the customer or vendee. *Beare Co.*, 711 S.W.2d at 605. Thus, because Itel is the lessor and the transferor of the taxable property in this case, the incidence of the tax is upon Itel. The mere fact that statutory provision is made for Itel, if possible, to pass the tax on to its customers does not change the reality that the legal burden of the tax is only upon Itel. *Id.; Smoky Mountain Canteen*, 247 S.W.2d at 72. Therefore, the tax in this case is not imposed on foreign nationals or foreign interests as such, but upon Itel, a domestic corporation which freely chose to locate its operations in Tennessee.

Although Itel may recoup the tax paid to Tennessee by raising its prices to its foreign customers, Itel is not thereby passing on the tax any more than it is passing on one of its costs of doing business, just as it might pass along to customers other expenses such as steel prices, labor or overhead costs. If the market will not bear the increased cost, Itel might have to absorb those costs by lowering its prices, or else lose business. Customers, foreign or domestic, who think Itel's (or any other Tennessee lessor's) effective prices are too high because of the added cost of Tennessee's tax will lease containers elsewhere. Of course, overhead and other costs of doing business might actually be lower in Tennessee than in some locations, thereby offsetting any increase in the seller/lessor's costs that might be attributable to sales tax burden. For locating in Tennessee and enjoying the benefits of making sales and leases in Tennessee, Itel is legally required to pay sales tax. Tennessee's tax does not burden

foreign entities or interests; the tax here is a burden, if at all, only upon the market position of Itel. No rational foreign government would retaliate against a Tennessee tax which burdens, if anyone, only Tennessee business activities.

This case is decidedly unlike *Japan Line*, in which state taxes were imposed directly upon the property of foreign nationals. Even if Japan had not already imposed its own tax on such property, it could reasonably be expected in such circumstances to retaliate against an American tax on Japanese property by imposing a Japanese tax on American property. That real threat of retaliatory action by a foreign government underscored the need for uniformity of action and policy by the United States government, and thus militated against the attempted taxation of foreign property by individual states.

In the present case, there exists no reasonable prospect of foreign retaliation against Tennessee's sales tax. Therefore, there is no need for uniform federal action or policy, and the Tennessee tax impedes no such federal policy.

Itel (Brief at 31) and the United Kingdom (Amicus Brief at 7-9) argue that foreign nations into which the containers may wander would have sufficient nexus to tax the use of the containers, thus duplicating the Tennessee sales tax. However, if a container is imported into the United Kingdom and subsequently is exported while the same lease is in effect – that is, no intervening sale or lease transfer occurs while the container is in the United Kingdom – then such a use tax by the United Kingdom would simply be a tax upon the container's presence in the United Kingdom, or would be a tax on "mere transit"

through that nation. Such a tax would be far more akin to a tax upon importation than is Tennessee's tax, and therefore would probably violate the Customs Conventions on Containers so relied upon by Itel. Thus, Itel's arguments in this case point more to the invalidity of the imaginary, retaliatory taxes of foreign nations than of Tennessee's tax system.

The taxing powers of American states should not be paralyzed by the speculative possibility that another nation might claim to have taxing nexus when it does not, or that another nation might try to impose some other discriminatory or improper tax against which the United States might have justifiable grounds for protest. If Tennessee's tax is reasonable, practical, and justifiable as an appropriate means of taxing in-state business activity, the "one voice" standard should not require Tennessee or other states to yield before the possibility of an irrational or ulterior foreign tax.

Certainly the constitutional need of the United States government to "speak with one voice" in foreign affairs does not require a state to endure exploitation of its marketplace by businesses involved in international trade, without the ability to tax the purely local aspects of such business activities that enjoy benefits and protections furnished by the state. Prohibition of such state taxes would in effect force states to subsidize foreign trade at the expense of those local businesses which are forced to contribute to the state's revenues. Absent some unmistakably clear effort by the federal government to require such subsidies for foreign trade, the interests of the states and of local businesses should not be so constrained.

The sovereign right of Tennessee to tax local activities does not collide with federal policy concerns. The sales tax collected from Itel is constitutionally sound.

II. THE SALES TAX IN THIS CASE DOES NOT VIOLATE THE IMPORT-EXPORT CLAUSE.

Itel contends that the sales tax on its transfers of cargo containers in Tennessee violates the Import-Export Clause, which provides:

> No state shall, without the consent of the congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the congress.

U.S. CONST. art. I, § 10, cl. 2.

Of course, the tax in this case was not levied on any imports or exports. Itel's containers were not themselves goods in commerce, but were merely vehicles for transporting imported or exported goods. *See Canton R.R. v. Rogan*, 340 U.S. 511 (1951). The sales tax on leases of items used in handling or transporting goods to be exported is thus much closer to the business and occupation tax on stevedoring activities that was upheld in *Department of Revenue v. Association of Washington Stevedoring Cos.*, 435 U.S. 734 (1978).

In any event, early decisions under the Import-Export Clause often "assumed that all taxes on imports and exports and on the importing and exporting processes were banned by the Clause." *Id.*, 435 U.S. at 752 (describing earlier cases such as *Richfield Oil Corp. v. State*

Bd. of Equalization, 329 U.S. 69 (1946)). In *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976), however, the Court "specifically abandoned" the prior analysis, and instead shifted the focus to the question whether a challenged state tax constitutes an "impost or duty." *Limbach v. Hooven & Allison Co.*, 466 U.S. 353, 360 (1984).

Since *Michelin*, Import-Export Clause analysis examines whether a challenged state tax offends any of the three policy considerations identified by the Court as underlying the Clause:

> The Framers of the Constitution thus sought to alleviate three main concerns . . . : [1] the Federal Government must speak with one voice when regulating commercial relations with foreign governments, and tariffs, which might affect foreign relations, could not be implemented by the States consistently with that exclusive power; [2] import revenues were to be the major source of revenue of the Federal Government and should not be diverted to the States; and [3] harmony among the States might be disturbed unless seaboard States, with their crucial ports of entry, were prohibited from levying taxes on citizens of other States by taxing goods merely flowing through their ports to other States not situated as favorably geographically.

Washington Stevedoring, 435 U.S. at 752-53, *quoting Michelin*, 423 U.S. at 285-86.

A. Tennessee's Sales Tax Satisfies The *Michelin* Analysis.

The sales tax challenged by Itel in this case does not offend any of the policy considerations underlying the Import-Export Clause. As argued above, the tax does not

interfere with the federal government's ability to "speak with one voice" in regulating commerce with foreign governments. As the trial court correctly recognized, the sales tax is generally applicable "whenever any goods change hands for consideration in Tennessee." (Pet. App. at 22a). The Tennessee sales tax is a general business tax that applies to virtually all businesses in the state, and thus does not create any special protective tariff, such as the Framers intended to prohibit. *Washington Stevedoring*, 435 U.S. at 753.

As to the second policy concern of the Import-Export Clause, the Tennessee sales tax does not deprive the federal government of any revenues to which it is entitled. Under 19 U.S.C. § 1322(a), Itel's cargo containers are exempt from federal customs duties in any event. Further, there is no evidence that application of the Tennessee sales tax would significantly diminish the number of imports on which the federal government could levy import duties. *Washington Stevedoring*, 435 U.S. at 753. Also, as argued above, Tennessee's tax bears no relation to the importation of the containers, but is a tax purely on the business of transferring the containers to other parties within the state for consideration. If Itel imported containers and then itself exported them from Tennessee, without transferring them to lessees while in Tennessee, the sales tax would not be imposed. *Beecham Laboratories*, 569 S.W.2d at 458. Thus, the Tennessee sales tax is clearly not a tax on imports.

Analysis under the third Import-Export Clause element, involving the prevention of interstate rivalry and friction, is substantially identical to the Commerce Clause analysis described by the Supreme Court in *Complete Auto*, 430 U.S. 274. The third Import-Export Clause policy

is thus vindicated if the taxpayer has reasonable nexus with the taxing state, the tax is properly apportioned, is nondiscriminatory, and is reasonably related to services provided by the state. *Washington Stevedoring*, 435 U.S. at 755; *Complete Auto*, 430 U.S. at 279. The four *Complete Auto* factors are readily satisfied by the Tennessee sales tax, and are not seriously disputed by Itel.

First of all, Itel clearly had nexus with Tennessee in this case. The Itel containers which were the subject of the taxed lease transactions were physically present in Tennessee. From and after July 1, 1985, Itel had employees located in Tennessee directly involved in delivery of the containers and related activities, and after August 1, 1985, Itel maintained a terminal in Memphis for handling such deliveries. (Pet. App. at 31a; Stip. ¶33 *et seq.*) Prior to that time, Itel containers were present at "third party" depots located in Tennessee, from which the containers were delivered to and picked up by Itel's customers. (Pet. App. at 31a; Stip. ¶32). Itel's characterization of those depots as "independent contractors" holds no constitutional significance, because the use of those depots for delivery and pick up of Itel containers directly facilitated a substantial flow of business for Itel, and especially because the containers themselves were physically located in Tennessee. *Scripto, Inc. v. Carson*, 362 U.S. 207, 211 (1960). In addition, Itel was registered with the Sales and Use Tax Division of the Tennessee Department of Revenue as a dealer, and paid sales and use tax on other transactions based in Tennessee. (Pet. App. at 31a; Stip. ¶38). Finally, and most important, the activity assessed for tax in this case – the physical transfer of possession of the containers to Itel's customers – actually occurred in Tennessee.

Itel's physical presence in Tennessee, through its facilities, employees, and containers, establishes far greater nexus than was found to be sufficient in *Scripto*, 362 U.S. at 211 (a few "independent contractor" salesmen) or in *Standard Pressed Steel Co. v. Washington Dept. of Revenue*, 419 U.S. 560, 561 (1975) (one employee, a non-salesman engineering consultant). *See also National Geographic Society v. California Bd. of Equalization*, 430 U.S. 551 (1977). Itel's contacts with Tennessee therefore amply satisfy the bright-line substantial nexus rule of *Quill Corp. v. North Dakota*, No. 91-194, slip op. at 15 (U.S. May 26, 1992) and *National Bellas Hess, Inc. v. Dept. of Revenue*, 386 U.S. 753 (1967). *See also D.H. Holmes Co., Ltd. v. McNamara*, 486 U.S. 24, 32 (1988) ("nexus aplenty" where taxpayer has physical locations and economic presence in taxing state). Further, in the present case Tennessee had actual nexus with the transactions it seeks to tax, because those transactions, the transfers of possession of containers located in Tennessee, actually occurred in this state.

Despite the facts which establish Itel's actual presence in and thus nexus with Tennessee, it is argued that nexus did not exist because of the fiction that Itel's containers had no "legal presence" in Tennessee. (Brief of Institute of International Container Lessors, et al., at 27). Although 19 C.F.R. § 10.41a is cited as establishing that Itel's containers had no presence in Tennessee as a matter of law, nothing in that regulation supports such a legal fiction. Further, statements found in the *Xerox* and *McGoldrick* opinions to the effect that goods in customs-bonded warehouses are not subject to a state's taxing jurisdiction until withdrawn from the warehouses are

inapposite. As discussed above with regard to the preemption issue, there are drastic and congressionally-intended differences between the statutes and regulations pertaining to customs-bonded warehouses, and those excepting international cargo containers from the customs laws. Thus, the *Xerox* and *McGoldrick* opinions do not control here. Legal fictions devised in the context of customs-bonded warehouses do not also carry over to the subject of Itel's containers.

In any event, the crucial inquiry is not as to the extent and duration of Tennessee's nexus with the containers. Tennessee did not tax the containers. The question is whether Tennessee had sufficient nexus with Itel, and with Itel's business activities which gave rise to the tax. Itel was physically located in Tennessee, and conducted substantial business out of its Tennessee locations. The particular business transactions taxed in this case, the deliveries of containers to Itel's customers, actually occurred in Tennessee. The tax here beyond all doubt satisfies the nexus prong of *Complete Auto*.

Likewise, the second prong of the *Complete Auto* test is satisfied because Tennessee's sales tax is properly apportioned. The tax is consistent both internally and externally, as discussed above. Further, the tax reaches only those transactions in which delivery of the leased containers from Itel to its customers occurred in Tennessee; deliveries out-of-state or other Itel transactions based outside Tennessee are not taxed. Indeed, the trial court in this case struck down the assessment of tax on deliveries from Itel's Tennessee locations but consummated out-of-state. Therefore, the Tennessee sales tax is properly apportioned for purposes of the *Complete Auto* analysis. *Washington Stevedoring*, 435 U.S. at 746-47.

As to the third *Complete Auto* factor, the Tennessee sales tax is completely nondiscriminatory. The tax even-handedly applies to transfers of possession of tangible personal property for consideration occurring in Tennessee, and does not single out interstate or international business for any special burdens.

Itel's argument (Pet. Brief at 35-36) that Tennessee's tax system discriminates against foreign commerce is both unsupported by authority and patently incorrect. The Tennessee Supreme Court has recognized and held that the sales and use tax system is a uniform scheme designed to prevent avoidance of sales tax and ensure that Tennessee businesses do not suffer competitive disadvantage due to consumers purchasing goods out-of-state in order to avoid taxes. *Woods v. M.J. Kelley Co.*, 592 S.W.2d 567, 570 (Tenn.), *cert. denied*, 447 U.S. 905 (1980). Where an equivalent tax has been paid on a purchase outside Tennessee, the overall sales tax system does not require payment of use tax in Tennessee, because the customer's decision to buy out-of-state was presumably not determined by tax avoidance goals. The Tennessee Supreme Court has thus recognized that there is no legislative intent in Tennessee's sales tax statutes to levy more than one tax on a transaction, and that, for that very underlying reason, credits and adjustments are granted when equivalent tax has been paid to another jurisdiction. *Nasco, Inc. v. Jackson*, 748 S.W.2d 193, 196 (Tenn. 1988). Thus, even though Tenn. Code Ann. §§ 67-6-313(f) and 67-6-507(g) (Supp. 1991) refer to "states," the taxation policy of the Tennessee legislature as recognized by the Tennessee Supreme Court would allow similar credits and adjustments for equivalent taxes paid in another state or in another nation.

Finally, the fourth prong of *Complete Auto* is satisfied because Itel indisputably enjoys the benefits, protections, and services of Tennessee state and local governments. Itel's terminal and other facilities, its employees, and indeed its containers located in Tennessee all benefit from fire and police protection, and other civic services. The tax here is closely related to those benefits of an orderly society provided to Itel by Tennessee. *D.H. Holmes*, 486 U.S. at 32.

By satisfying the *Complete Auto* tests, and the other policy concerns identified in *Michelin*, the Tennessee sales tax readily passes constitutional muster under the Import-Export Clause.

B. The Tax Is Not A Direct Tax On Goods In Transit.

The *Michelin* Court apparently limited its holding by noting that the facts of that case involved only state taxation of goods "no longer in transit." *Michelin*, 423 U.S. at 302. However, this Court later concluded that the *Michelin* three-prong policy analysis should also determine Import-Export Clause questions where the goods are in transit, so long as the challenged state tax falls upon activities distinct from the goods and their value. *Washington Stevedoring*, 435 U.S. at 757.

As discussed above (pp. 15-18), the Tennessee sales tax is not an *ad valorem* tax, and is not a direct tax on the containers themselves. Instead, the sales tax is a privilege tax on persons engaging in certain types of business transactions. *Itel*, 814 S.W.2d at 38; *Hooten*, 209 S.W.2d at 274. Moreover, the containers carry imported goods, but are not themselves imported goods. Finally, the tax in this case was measured by the gross proceeds of the leases,

not the value of the containers. T.C.A. § 67-6-204. A rental price, including charges for related services, agreed upon by the parties to a lease is something quite distinct from the value of the leased item.

Itel's reliance upon *Louisiana Land and Exploration Co. v. Pilot Petroleum Corp.*, 900 F.2d 816 (5th Cir. 1990), *cert. denied.*, ___ U.S. ___, 111 S.Ct. 248 (1991), is misplaced. In *Louisiana Land*, the challenged Alabama tax was levied specifically on fuel, and was not a generally applicable sales tax such as the Tennessee tax in this case. *Id.*, 900 F.2d at 817n.1. Because the Alabama tax was aimed at a specific category of goods, it was susceptible of being used to create a protective tariff, in violation of the Import-Export Clause. *See Washington Stevedoring*, 435 U.S. at 753. Further, the incidence of the Alabama tax was on the consumer, unlike the Tennessee tax which is levied upon the seller. *Id.*, 900 F.2d at 818. Therefore, the Alabama tax was not a tax on the seller's business activities, but arguably constituted a direct tax on property purchased by the consumer. For those reasons, the tax in *Louisiana Land* is distinguishable from the sales tax in this case.

Regardless of whether goods are "in transit," the Import-Export Clause analysis of direct taxes employed in *Louisiana Land* does not apply when, as in the present case, the challenged tax is not a direct tax. *Washington Stevedoring*, 435 U.S. at 757. Instead, the Tennessee Supreme Court correctly applied the modern three-prong policy analysis of *Michelin*, 423 U.S. at 285-86, in upholding the tax against Itel's Import-Export Clause challenge. (Pet. App. at 17a).

CONCLUSION

For the reasons set forth above, the Commissioner of Revenue of the State of Tennessee respectfully submits that the decision of the Tennessee Supreme Court upholding the sales tax in this case was correct, and should be affirmed.

Respectfully submitted,

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APPENDIX

Tennessee Constitution,
Article 2, Section 28

In accordance with the following provisions, all property real, personal or mixed shall be subject to taxation, but the Legislature may except such as may be held by the State, by Counties, Cities or Towns, and used exclusively for public or corporation purposes, and such as may be held and used for purposes purely religious, charitable, scientific, literary or educational, and shall except the direct product of the soil in the hands of the producer, and his immediate vendee, and the entire amount of money deposited in an individual's personal or family checking or savings accounts. For purposes of taxation, property shall be classified into three classes, to wit: Real Property, Tangible Personal Property and Intangible Personal Property.

Real Property shall be classified into four (4) subclassifications and assessed as follows:

(a) Public Utility Property, to be assessed at fifty-five (55%) percent of its value;

(b) Industrial and Commercial Property, to be assessed at forty (40%) percent of its value;

(c) Residential Property, to be assessed at twenty-five (25%) percent of its value, provided that residential property containing two (2) or more rental units is hereby defined as industrial and commercial property; and

(d) Farm Property, to be assessed at twenty-five (25%) percent of its value.

House trailers, mobile homes, and all other similar movable structures used for commercial, industrial, or residential purposes shall be assessed as Real Property as an improvement to the land where located.

The Legislature shall provide tax relief to elderly low-income taxpayers through payments by the State to reimburse all or part of the taxes paid by such persons on owner-occupied residential property, but such reimbursement shall not be an obligation imposed, directly or indirectly, upon Counties, Cities or Towns; provided, that such tax relief for the years 1973 through 1977 shall be not less than an amount equal to the State, County, and Municipal Taxes on Five Thousand ($5,000) Dollars worth of the full market value (or One Thousand Two Hundred Fifty ($1,250) Dollars of the assessed value) of property used for a residence by any taxpayer over sixty-five (65) years of age for a period of one (1) year prior to the date of assessment; provided further, that such relief shall not extend to persons having a total annual income from all sources in excess of Four Thousand Eight Hundred ($4,800) Dollars.

The Legislature may provide tax relief to home owners totally and permanently disabled, irrespective of age, as provided herein for the elderly.

Tangible Personal Property shall be classified into three (3) subclassifications and assessed as follows:

(a) Public Utility Property, to be assessed at fifty-five (55%) percent of its value;

(b) Industrial and Commercial Property, to be assessed at thirty (30%) percent of its value; and

(c) All other Tangible Personal Property, to be assessed at five (5%) percent of its value; provided, however, that the Legislature shall exempt Seven Thousand Five Hundred ($7,500) Dollars worth of such Tangible Personal Property which shall cover personal household goods and furnishings, wearing apparel and other such tangible property in the hands of a taxpayer.

The Legislature shall have power to classify Intangible Personal Property into subclassifications and to establish a ratio of assessment to value in each class or subclass, and shall provide fair and equitable methods of apportionment of the value of same to this State for purposes of taxation. Banks, Insurance Companies, Loan and Investment Companies, Savings and Loan Associations, and all similar financial institutions, shall be assessed and taxed in such manner as the Legislature shall direct; provided that for the year 1973, or until such time as the Legislature may provide otherwise, the ratio of assessment to value of property presently taxed shall remain the same as provided by law for the year 1972; provided further that the taxes imposed upon such financial institutions, and paid by them, shall be in lieu of all taxes on the redeemable or cash value of all of their outstanding shares of capital stock, policies of insurance, customer savings and checking accounts, certificates of deposit, and certificates of investment, by whatever name called, including other intangible corporate property of such financial institutions.

The ratio of assessment to value of property in each class or subclass shall be equal and uniform throughout the State, the value and definition of property in each class or subclass to be ascertained in such manner as the

Legislature shall direct. Each respective taxing authority shall apply the same tax rate to all property within its jurisdiction.

The Legislature shall have power to tax merchants, peddlers, and privileges, in such manner as they may from time to time direct, and the Legislature may levy a gross receipts tax on merchants and businesses in lieu of ad valorem taxes on the inventories of merchandise held by such merchants and businesses for sale or exchange. The portion of a Merchant's Capital use in the purpose of merchandise sold by him to non-residents and sent beyond the State, shall not be taxed at a rate higher than the ad valorem tax on property. The Legislature shall have power to levy a tax upon incomes derived from stocks and bonds that are not taxed ad valorem.

This amendment shall take effect on the first day of January, 1973.

Tenn. Code Ann. § 67-5-2101

The taxes assessed by the state of Tennessee, a county, or municipality, taxing district, or other local governmental entity, upon any property of whatever kind, and all penalties, interest, and costs accruing thereon, shall become and remain a first lien upon such property from January 1 of the year for which such taxes are assessed.

Tenn. Code Ann. § 67-6-102(23)(A) (Supp. 1991)

"Sale" means any transfer of title or possession, or both, exchange, barter, lease or rental, conditional, or

otherwise, in any manner or by any means whatsoever of tangible personal property for a consideration, and includes the fabrication of tangible personal property for consumers who furnish, either directly or indirectly, the materials used in fabrication work, and the furnishing, repairing or serving for a consideration of any tangible personal property consumed on the premises of the person furnishing, preparing or serving such tangible personal property;

Tenn. Code Ann. § 67-6-201

It is declared to be the legislative intent that every person is exercising a taxable privilege who:

(1) Engages in the business of selling tangible personal property at retail in this state;

(2) Uses or consumes in this state any item or article of tangible personal property as defined in this chapter, irrespective of the ownership thereof or any tax immunity which may be enjoyed by the owner thereof;

(3) Is the recipient of any of the things or services taxable under this chapter;

(4) Rents or furnishes any of the things or services taxable under this chapter;

(5) Stores for use or consumption in this state any item or article of tangible personal property as defined in this chapter;

(6) Leases or rents such property, either as lessor or lessee, within the state of Tennessee;

(7) Charges admission, dues or fees taxable under this chapter; or

(8) Sells space under this chapter.

Tenn. Code Ann. § 67-6-202

For the exercise of the privilege of engaging in the business of selling tangible personal property at retail in this state, a tax is levied at the rate of five and one-half percent (5.5%) of the sales price of each item or article of tangible personal property when sold at retail in this state; the tax is to be computed on gross sales for the purpose of remitting the amount of tax due the state and is to include each and every retail sale.

Tenn. Code Ann. § 67-6-204(a)

(a) It is declared to be the intention of this chapter to impose a tax on the gross proceeds of all leases and rentals of tangible personal property in this state where the lease or rental is a part of the regularly established business, or the same is incidental or germane thereto. The tax is levied as follows:

(1) At the rate of five and one-half percent (5.5%) of the gross proceeds derived from the lease or rental of tangible personal property, as defined herein, where the lease or rental of such property is an established business, or part of an established business, or the same is incidental or germane to the business.

(2) At the rate of five and one-half percent (5.5%) of the monthly lease or rental price by lessee or renter, or

contracted or agreed to be paid by lessee or renter, to the owner of the tangible personal property.

Tenn. Code Ann. § 67-6-313(a)

(a) It is not the intention of this chapter to levy a tax upon articles of tangible personal property imported into this state or produced or manufactured in this state for export.

Tenn. Code Ann. § 67-6-313(f)

(f) In order to prevent actual multistate taxation of the acts and privileges subject to tax under this chapter, any taxpayer, upon proof acceptable to the commissioner being submitted that the taxpayer has properly paid sales and use tax in another state on such acts and privileges, shall be allowed a credit against the tax imposed by this chapter to the extent of the amount of such tax properly due and paid in another state.

Tenn. Code Ann. § 67-6-507(g) (Supp. 1991)

(g) In order to prevent actual multistate taxation of the acts and privileges subject to tax under this chapter, any taxpayer, upon proof acceptable to the commissioner being submitted that the taxpayer has properly paid tax on the privilege of sale or usage in another state on such acts and privileges, shall be allowed a credit against the tax imposed by this chapter to the extent of the amount of such tax properly due and paid in another state.

Tenn. Code Ann. § 67-6-517

(a) In the event any dealer fails to make a report and pay the tax as provided by this chapter, or in case any dealer makes a grossly incorrect report, or a report that is false or fraudulent, it shall be the duty of the commissioner to make an estimate for the taxable period of retail sales of such dealer, or of the gross proceeds for rentals or leases of tangible personal property by the dealer, estimating the cost price of all articles of tangible personal property imported by the dealer for use or consumption or distribution or storage to be used or consumed in this state, and assess and collect the tax and interest, plus penalty, if such have accrued, on the basis of such assessment, which shall be considered prima facie correct, and the burden to show the contrary shall rest upon the dealer.

(b) If any dealer subject to make and file a return required by any provision of this chapter fails to render such return within the time required or renders a return which is false or fraudulent in that it contains statements which differ from the true gross sales, purchases, leases, or rentals taxable under this chapter, or otherwise fails to comply with the provisions of this chapter for the taxable period for which the return is made, the commissioner shall give the dealer ten (10) days' notice in writing requiring the dealer to appear before him or his assistant with such books, records, and papers as he may require relating to the business of the dealer for such taxable period; and the commissioner may require the dealer or the agents and employees of such dealer to give testimony or to answer interrogatories under oath administered by the commissioner or his assistants respecting the

sale at retail, the use, consumption, or distribution, or storage for use or consumption in the state or lease or rental of tangible personal property subject to tax or the failure to make report thereof as provided in this chapter.

(c) If any dealer fails to make any such return or refuses to permit an examination of his books, records or papers, or to appear and answer questions within the scope of such investigation relating to the sale, use, consumption, distribution, storage, lease, or rental of tangible personal property, the commissioner is authorized to make an assessment based upon such information as may be available to him and to issue a distress warrant for the collection of any such taxes, interest or penalties found to be due. Any such assessment shall be deemed prima facie correct.

(d) In the event the dealer has imported the tangible personal property and he fails to produce an invoice showing the cost price of the articles as defined in this chapter, which are subject to tax, or the invoice does not reflect the true or actual cost price as defined herein, then the commissioner shall ascertain, in any manner feasible, the true cost price, and assess and collect the tax with interest plus penalties, if such have accrued on the true cost price as assessed by him; the assessment so made shall be considered prima facie correct, and the duty shall be on the dealer to show the contrary.

(e) In the case of the lease or rental of tangible personal property, if the consideration given or reported by the dealer does not, in the judgment of the commissioner, represent the true or actual consideration, then the commissioner is authorized to fix the same and collect the

tax thereon in the same manner as above provided, with interest plus penalties, if such have accrued.